

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL )  
SERVICES, DIVISION OF )  
WORKERS' COMPENSATION, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 05-3831  
 )  
CHRISTOPHER CURRY, )  
d/b/a CURRY LAND SERVICE, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Notice was provided and on May 5, 2006, a formal hearing was held in this case. Authority for conducting the hearing is set forth in Sections 120.569 and 120.57(1), Florida Statutes (2005). The hearing location was the Department of Transportation District Office, 1109 South Marion Avenue, Lake City, Florida. Charles C. Adams, Administrative Law Judge, conducted the hearing.

APPEARANCES

For Petitioner: H. F. Rick Mann, Esquire  
Department of Financial Services  
Division of Legal Services  
200 East Gaines Street  
Tallahassee, Florida 32399-4229

For Respondent: Christopher Curry, pro se  
1259 Southwest County Road 252B  
Lake City, Florida 32024

STATEMENT OF THE ISSUE

Has Respondent failed to secure payment of workers' compensation for his employees, Section 440.107(2), Florida Statutes (2005), justifying the entry of a stop-work order, Subsection 440.107(7)(a), Florida Statutes (2005), and the entry of a financial penalty against Respondent, Subsection 440.107(7)(d), Florida Statutes (2005), as imputed, Subsection 440.107(7)(e), Florida Statutes (2005)?

PRELIMINARY STATEMENT

On August 11, 2005, Petitioner served a stop-work order on Respondent for the alleged failure to pay workers' compensation in violation of Section 440.107(2), Florida Statutes (2005). At the same time, an Order of Penalty Assessment was served in accordance with Subsection 440.107(7)(d), Florida Statutes (2005). Respondent was also noticed of his rights to be heard in association with the stop-work order under procedures set forth in Sections 120.569 and 120.57, Florida Statutes (2005), upon the filing of a petition in a form consistent with Florida Administrative Code Chapter 28-106.

On August 11, 2005, Petitioner requested that Respondent produce business records to support its calculation of a penalty assessment. The request for production was made consistent with Subsection 440.107(7)(d), Florida Statutes (2005), with the

various categories of information sought being detailed in the request for production.

Proceeding without the benefit Respondent's business records, Petitioner imputed weekly payroll amounts and established a penalty calculation for the period August 11, 2002, through August 11, 2005. § 440.107(7)(e), Fla. Stat. (2005).

On September 1, 2005, Respondent was notified of the Penalty Assessment in an Amended Order of Penalty Assessment totaling \$121,039.00. The service of the Amended Order of Penalty Assessment on that date informed Respondent of the right to contest the Amended Order of Penalty Assessment.

Respondent petitioned for a hearing pursuant to Section 120.57, Florida Statutes (2005), and Florida Administrative Code Chapter 28-106, to challenge the stop-work order and the Amended Order of Penalty Assessment.

On October 17, 2005, Petitioner forwarded the petition for formal administrative hearing, requesting the assignment of an administrative law judge to conduct a formal hearing before the Division of Administrative Hearings (DOAH), pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2005). The case became DOAH Case No. 05-3831, and an administrative law judge was assigned to conduct necessary proceedings. Eventually the

formal hearing was held before the undersigned in substitution for prior administrative law judges.

Respondent's counsel moved to withdraw based upon a lack of cooperation by his client in meeting appointments to produce information concerning this case. On April 14, 2006, an order was entered allowing the withdrawal of counsel. Beyond that point, Respondent proceeded pro se.

Pending the final hearing in this case, Petitioner sought production of Respondent's business records, employing the Florida Rules of Civil Procedure. Those records were not produced in response to the discovery request, and orders were entered requiring production.

At hearing, Petitioner presented Michael Robinson, an investigator for the Petitioner's Bureau of Compliance as its witness. Petitioner's Exhibits numbered 1 through 6 were admitted.

Respondent offered Respondent's Exhibits numbered 1 through 7. Ruling was reserved on Respondent's Exhibit numbered 1. It is denied admission. Respondent's Exhibits numbered 2 through 7 were denied admission at hearing. Respondent's Exhibit numbered 2 is a W-2 wage and tax statement for Collin Grimes, the year 2005. Respondent's Exhibits 3 through 7 are constituted of Schedule C, Form 1040, the proprietorship of Christopher and Michelle L. Curry, the year 2003; Schedule C, Form 1040,

proprietorship of Christopher Curry, the year 2004; Schedule C, Form 1040, proprietorship of Christopher Curry, the year 2005; Schedule E, Form 1040, proprietorship of Christopher and Michelle L. Curry, the year 2005; and Form 1120S U.S. Income Tax Return for an S corporation the year 2005 for Curry Land Services, Inc.<sup>1/</sup>

Respondent did not testify nor present witnesses in his defense.

At hearing Petitioner requested that official recognition be made of Florida Administrative Code Rules 69L-6.021 and 69L-6.028. That motion was granted. Petitioner's post-hearing Motion for Official Recognition of Florida Administrative Code Rule 69L-6.015 is also granted.

On May 24, 2006, the hearing transcript was filed with DOAH. Proposed recommended orders by the parties have been considered in preparing the Recommended Order.

#### FINDINGS OF FACT

1. Michael Robinson is an investigator for Petitioner's Bureau of Compliance. His duties include job site visits to determine whether individuals on the site are employees, by whom those persons are employed and whether the employer has secured the payment of workers' compensation by obtaining necessary insurance coverage. Some site visits are made on a random basis. That was the case here.

2. On August 11, 2005, Mr. Robinson went to an address in Lake City, Florida, referred to as 223 NW Sylvi Drive. There he observed three individuals laying sod in the yard of the private residence located at the address.

3. Respondent, a fourth individual, was transporting sod from a trailer to the yard using equipment described as a Bobcat.

4. The sod had been cut in squares and the squares were being matched and placed on the ground in the yard, where it was stepped on to secure it in the ground in a checker board pattern. Approximately three-quarters of the yard had sod placed.

5. Mr. Robinson considered the activities on the site as involving a construction industry, with a classification, according to the National Council on Compensation, Inc. (NCCI), as class code 0042, landscape gardening and drivers, as reflected in Florida Administrative Code Rule 69L-6.021(1)(a). The NCCI classification codes for job descriptions were adopted by the rule.

6. Mr. Robinson observed a permit board erected in the front yard of the property. There was no evidence that he saw which would indicate anyone was living in the home. The garage door was open. There was nothing in the garage. No blinds were

on the windows. No evidence of any kind was observed that would indicate the house had been occupied.

7. Altogether four persons were working at the site. Mr. Robinson interviewed each individual.

8. After introducing himself, Mr. Robinson explained to Respondent the reason for the site visit and determined that Respondent was the employer for the other individuals, in addition to working on the job. Respondent told Mr. Robinson that he was a sub-contractor working for Earth Scapes, and had been hired to lay new sod in the yard. Respondent described his position as that of a sole proprietor. Respondent identified two of the other individuals as being his step-sons and the remaining individual was a family friend. Respondent explained that the basis for compensating the other employees was that Respondent "gave them running around money on Friday's." The other individuals indicated that they worked for Respondent part-time when he needed their help.

9. To verify Respondent's statement that he was a sub-contractor assigned to the job, Mr. Robinson contacted the owner of Earth Scapes, who agreed with Respondent's recount of his assignment at the job location. Mr. Robinson was told Earth Scapes is a nursery that lays new sod and plants trees.

10. Mr. Robinson inquired of Mr. Curry concerning workers' compensation coverage for the three employees. The answer was that Respondent did not have workers' compensation coverage through an insurance policy or through a leasing company or temporary labor service. Research into coverage and compliance through a Coverage and Compliance Automated System (CCAS) data base available to Petitioner did not reveal any information concerning Respondent and his business at 1259 SW County Road, 252-B, Lake City, Florida, that would relate to workers' compensation coverage. A similar search of a data base maintained by Petitioner in association with exemptions from the requirement to obtain workers' compensation coverage did not reveal any exemption for Respondent from the need for workers' compensation coverage.

11. Having discovered the activity on the construction site in which work was done without workers' compensation coverage, Mr. Robinson discussed his findings with Robert Lambert, Petitioner's district supervisor in the Bureau of Compliance. Following that conversation Mr. Lambert authorized Mr. Robinson to issue a stop-work order to Respondent. A stop-work order was prepared on August 11, 2005. The stop-work order was served on Respondent on that date. The basis for its entry was the failure to secure payment of workers' compensation in violation of Section 440.107(2), Florida Statutes (2005), by



failing to obtain coverage that would meet the requirements set forth in Chapter 440, Florida Statutes, and provisions of the Florida Insurance Code (the Insurance Code). On that same date, an Order of Penalty Assessment was served on Respondent under authority set for in Section 440.107(7)(d), Florida Statutes (2005). The Order of Penalty Assessment also reminded Respondent that the penalty might be amended based upon other information obtained, including the production of business records held by Respondent. These orders advised Respondent that he had the right to contest material facts in the stop-work order by filing a written petition for hearing under Sections 120.569 and 120.57, Florida Statutes (2005).

12. On August 11, 2005, by a written document, Mr. Robinson requested production of business records maintained by Respondent that would assist in the calculation of a penalty assessment for the period August 11, 2002, through August 11, 2005, as contemplated by Section 440.107(7), Florida Statutes. The written request for production reminded Respondent that he must produce those records within five business days after receipt, to allow examination and copying, and that the failure to do so by quality of information sufficient to allow the determination of the payroll for the period in question, would allow the Petitioner to impute weekly payroll for the three employees and Respondent pursuant to the information derived

using Section 440.12(2), Florida Statutes (2005), multiplied by 1.5. The document served on Respondent set out the various categories of information requested for production. These categories comport with Florida Administrative Code Rule 69L-6.015. Respondent did not honor this request at any time.<sup>2/</sup>

13. Mr. Robinson not only provided the list of categories of information sought for production, he explained the categories found on the list to Respondent. Examples of information sought and explained included timesheets, time cards, payroll check stubs, check ledgers, income tax returns that would reflect the amount of remuneration paid or payable to each employee.

14. On September 1, 2005, Mr. Robinson served Respondent with an Amended Order of Penalty Assessment that set forth an assessed penalty of \$121,039.00, by imputation under Subsection 440.107(7)(d) and (e), Florida Statutes (2005), and by resort to Florida Administrative Code Rule 69L-6.028. That rule allows the imputation of payroll calculations after 15 business days following receipt by the employer of a written request to produce business records and the method will not be set aside after 45 days from receipt. The Amended Order of Penalty Assessment reminded Respondent that the stop-work order would remain in effect unless that order was released by Petitioner's further order. The necessary steps to set aside the stop-work

order depended on obtaining coverage under the workers' compensation law and the payment of the penalty assessment. The approach for serving the Amended Order of Penalty Assessment was by certified mail return receipt requested. The receipt was returned following service. The Amended Order of Penalty Assessment provided the Respondent with the opportunity to dispute the material facts associated with the Amended Order of Penalty Assessment under procedures found in Sections 120.569 and 120.57, Florida Statutes (2005). As indicated, Respondent took advantage of the right to contest matters leading to the final hearing.

15. The Amended Order of Penalty Assessment as set forth in Petitioner's Exhibit number six also reflects a worksheet that applies to the overall period in question. It demonstrates the calculations imputed related to Respondent, Tony Joe Brown, Collin Grimes, and Josh Grimes, persons on the job site when the random inspection took place on August 11, 2005. The calculations in the matrix for all parts, were in relation to the four workers under class code 0042, without the benefit of actual information provided by Respondent. The job class codes are derived from the Scopes Manual, an insurance industry publication.

## CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the subject matter and parties to this action consistent with Sections 120.569 and 120.57(1), Florida Statutes (2005).

17. Having concluded that Respondent failed to secure the payment of workers' compensation, in that Respondent did not obtain coverage meeting the requirements of Chapter 440, Florida Statutes (2005) and the Insurance Code, Petitioner issued a stop-work order at the work site described as 223 NW Sylvi Drive, Lake City, Florida. § 440.107(2) and (3), Fla. Stat. (2005). Petitioner intends to continue with the stop-work order in effect, pending compliance by the Respondent with coverage requirements of Chapter 440, Florida Statutes, and the payment of a penalty that has been assessed in this case. § 440.107(7)(a), Fla. Stat. (2005).

18. Proof that Respondent failed to secure payment of workers' compensation as required, that authorized issuance of the stop-work order and the Amended Penalty Assessment, must be by clear and convincing of evidence. See Section 120.57(1)(j), Florida Statutes (2005), and Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

19. The nature of the activities being performed by Respondent and the other workers on the job site in Lake City, Florida was in association with the "construction industry" as defined at Section 440.02(8), Florida Statutes (2005), which states:

'Construction industry' means for-profit activities involving any building, clearing, filling, excavation, or substantial improvement in the size or use of any structure or the appearance of any land. However, 'construction' does not mean a homeowner's act of construction or the result of a construction upon his or her own premises, provided such premises are not intended to be sold, resold, or leased by the owner within 1 year after the commencement of construction. The division may, by rule, establish standard industrial classification codes and definitions thereof which meet the criteria of the term 'construction industry' as set forth in this section.

The nature of the construction undertaken by Respondent and his employees at the job site was landscaping under class code 0042. Fla. Admin. Code R. 69L-6.021(1)(a).

20. The persons working with Respondent at the work site and the Respondent himself, were employees as defined in Section 440.02(15)(a) and (c), Florida Statutes (2005), which states:

(a) 'Employee' means any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment under any appointment or contract for hire or apprenticeship, express or implied, or oral or written, whether lawfully or unlawfully

employed, and includes, but is not limited to, aliens and minors.

\* \* \*

(c) 'Employee' includes:

\* \* \*

2. All persons who are being paid by a construction contractor as a subcontractor, unless the subcontractor has validly elected an exemption as permitted by this chapter, or has otherwise secured the payment of compensation coverage as a subcontractor,  
. . .

\* \* \*

4. A sole proprietor who engages in the construction industry and a partner or partnership that is engaged in the construction industry.

"Sole proprietor" is defined at Section 440.02(25), Florida Statutes (2005).

21. Respondent was the employer of the other three persons on the work site as defined in Section 440.02(16)(a), Florida Statutes (2005), which states:

(16)(a) 'Employer' means . . . every person carrying on any employment . . .

22. The nature of the activities performed by Respondent and the other three employees on August 11, 2005, at the work site, constituted employment as defined in Section 440.02(17)(a) and (b), Florida Statutes (2005), which states:

(17)(a) 'Employment,' subject to the other provisions of this chapter, means any service performed by an employee for the person employing him or her.

(b) 'Employment' includes:

\* \* \*

2. All private employments in which four or more employees are employed by the same employer or, with respect to the construction industry, all private employment in which one or more employees are employed by the same employer.

\* \* \*

23. Respondent and the three persons on the work site are "persons" as defined in Section 440.02(23), Florida Statutes (2005), which states:

(23) 'Person' means individual, partnership, association, or corporation, including any public service corporation.

24. Respondent's liability to provide workers' compensation coverage for himself and the other employees on the job site is identified in Subsection 440.10(1)(a), Florida Statutes (2005), which states:

(1)(a) Every employer coming within the provisions of this chapter shall be liable for, and shall secure, the payment to his or her employees, or any physician, surgeon, or pharmacist providing services under the provisions of s. 440.13, of the compensation payable under ss 440.13, 440.15, and 440.16. Any contractor or subcontractor who engages in any public or private construction in the state shall secure and maintain compensation

for his or her employees under this chapter as provided in s. 440.38.

Respondent's obligation is in relation to his work as a subcontractor on the project he was engaged in on August 11, 2005.

25. Respondent was obligated to secure the payment for compensation in the manner described in Section 440.38, Florida Statutes (2005). Records review performed by the Petitioner revealed that Respondent had failed to secure payment of compensation as contemplated by Section 440.38, Florida Statutes (2005).

26. On August 11, 2005, when Mr. Robinson performed his random inspection of the job site, he did so under authority set forth in Section 440.107(3), Florida Statutes (2005). The subsequent investigation, issuance of a stop-work order, issuance of Penalty Assessment Orders and request to examine Respondent's business records concerning employees and the amount paid to the employees were consistent with that authority.

27. Knowing that Respondent, as an employer required to secure payment to him and his employees of workers' compensation provided for under Chapter 440, Florida Statutes, had failed to secure that payment, the stop-work order was issued on August 11, 2005, under authority set forth in Section



440.107(7)(a), Florida Statutes (2005). Under that same authority the stop-work order remains in effect because Respondent has yet to demonstrate compliance with the coverage requirements for workers' compensation. Similarly, the outstanding penalty assessment under that provision precludes the release of the stop-work order.

28. The penalty assessment in place properly covers the period August 11, 2002, through August 11, 2005. This is in recognition that Respondent had not provided workers' compensation at any time in that period for his business at 1259 SW County Road 252-B, Lake City, Florida. As a consequence, Respondent is subject to the penalty assessment calculations under the formula contemplated in Subsection 440.107(7)(d)1., which states:

In addition to any penalty, stop-work order, or injunction, the department shall assess against any employer who has failed to secure the payment of compensation as required by this chapter a penalty equal to 1.5 times the amount the employer would have paid in premium when applying approved manual rates to the employer's payroll during periods for which it failed to secure the payment of workers' compensation required by this chapter within the preceding 3-year period or \$1,000, whichever is greater.

29. The calculations must also take into account the expectation for periods prior to October 1, 2003, representing August 11, 2002, through September 30, 2003, of a \$100 dollar

per diem for each day in that period pursuant to Section 440.107(5), Florida Statutes (2002), and they did.

30. Respondent did not timely comply with the request to produce necessary business records. § 440.107(5), Fla. Stat. (2005), and Fla. Admin. Code R. 69L-6.015 and 6.028. In fact, Respondent never produced the business records sufficient to enable Petitioner to determine Respondent's payroll for the period in question. This led Petitioner to impute the amount pursuant to Florida Administrative Code Rule 69L-6.028 and Section 440.107(7)(e), Florida Statutes (2005), which states:

When an employer fails to provide business records sufficient to enable the department to determine the employer's payroll for the period requested for the calculation of the penalty provided in paragraph (d), for penalty calculation purposes, the imputed weekly payroll for each employee, corporate officer, sole proprietor, or partner shall be the statewide average weekly wage as defined in s. 440.12(2) multiplied by 1.5.

31. Respondent's argument that Petitioner should have issued a Notice of Non-Compliance, as if this case represents a minor violation of an agency rule is unpersuasive. § 120.695, Fla. Stat. (2005). The violation here is fundamental and has been recognized by the Legislature as serious. A Notice of Non-Compliance would not be appropriate.

RECOMMENDATION

Upon the consideration of the facts found and the conclusions of law reached, it is

RECOMMENDED:

That a Final Order be entered keeping the stop-work order in effect pending Respondent's proof that he has obtained necessary workers' compensation coverage and the payment of the Amended Penalty Assessment in the amount of \$121,039.00.

DONE AND ENTERED this 28th day of June, 2006, in Tallahassee, Leon County, Florida.



---

CHARLES C. ADAMS  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675    SUNCOM 278-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 28th day of June, 2006.

ENDNOTES

1/ The exhibits were denied admission as untimely, incomplete, and in the case of Respondent's numbered 2, irrelevant. See § 440.107(3)(c), (5) and (7), Fla. Stat. (2005), and Fla. Admin. Code R. 69L-6.015.

2/ Information which Respondent attempted to present at hearing was not of a kind to enable Petitioner to determine his payroll for the period in question.

COPIES FURNISHED:

H. F. Rick Mann, Esquire  
Department of Financial Services  
Division of Legal Services  
200 East Gaines Street  
Tallahassee, Florida 32399-4229

Christopher Curry  
1259 Southwest County Road 252B  
Lake City, Florida 32024

Honorable Tom Gallagher  
Chief Financial Officer  
Department of Financial Services  
The Capitol, Plaza Level 11  
Tallahassee, Florida 32399-0300

Carlos G. Muñiz, General Counsel  
Department of Financial Services  
The Capitol, Plaza Level 11  
Tallahassee, Florida 32399-0300

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.